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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-eighth session

SUMMARY RECORD OF THE 565th MEETING

Held at the Vienna International Centre, Vienna,
on Monday, 15 May 1995, at 9.30 a.m.

Chairman: Mr. GOH (Singapore)

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Electronic data interchange: draft Model Law

Title
Article 1

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Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

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Distr.: 22 November 1995

The meeting was called to order at 9.40 a.m.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW (A/CN.9/406, A/CN.9/407, A/CN.9/409 and Add.1-4)

1. **The CHAIRMAN** invited the Commission to begin its consideration of the draft Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication, contained in the annex to the report of the Working Group on EDI on the work of its twenty-eighth session (A/CN.9/406). The Commission also had before it a compilation of comments on the text by Governments and international organizations (A/CN.9/409 and Add.1-4).

2. **Mr. SORIEUL** (Secretariat) drew attention to the report of the Working Group on the work of its twenty-ninth session (A/CN.9/407), at which the Group had considered a draft commentary on the Model Law and suggested possible improvements to the draft Model Law itself. Those comments, which referred to paragraphs 46, 52, 57, 68, 87, 89 and 96, should be considered by the Commission in its present discussion.

3. In the text of the draft Model Law (A/CN.9/406, annex), in all language versions except Spanish, the reference in article 8, paragraph (3), to "subparagraph (b) of paragraph (1) of article 8" should rather be to "article 7".

Title

4. **The CHAIRMAN** said that the Model Law was at present entitled "Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication". China had proposed that the law be called "Model Law on electronic commerce" (A/CN.9/409/Add.2). Mexico had proposed that the law be called "Model Law on legal aspects of electronic commerce" (A/CN.9/409/Add.1); and Singapore had proposed "Model Law on electronic data interchange" (A/CN.9/409).

5. **Mr. ABASCAL ZAMORA** (Mexico) said that two different concepts had been considered by the Working Group in its formulation of the title: a strict technical definition of EDI as structured language which passed between computers, and a broader concept which covered all other means of communication, such as e-mail, fax and the like. The Working Group had decided to adopt the latter concept, including both EDI in the strictly technical sense and other means of communication. Since it had felt that the Model Law could not cover all aspects of the subject, it had added the reference to "legal aspects" in the title.

6. A proposal had been made to replace the phrase "electronic data interchange" by "electronic commerce" in order to enable readers unfamiliar with the subject to understand what the contents of the Model Law were. That proposal would not change the scope of the Model Law. It had not won the necessary support in the Working Group but was now being put forward again by Mexico (A/CN.9/409/Add.1).

7. **Mr. CHOUKRI SBAI** (Observer for Morocco) said that the present title was acceptable to his Government, but that it could usefully be shortened. It was not necessary to add the words "international" or "commercial", as that might result in a text which was insufficiently flexible in the light

(Mr. Choukri Sbai, Observer for Morocco)

of unforeseeable future developments in technology. Civil engineering works had attained such an importance in the international economy that the Model Law should apply to them as well as to commercial activities. The title should be "Model Law on electronic data interchange".

8. **Mr. BURMAN** (United States of America) said that he supported the proposals by China and Mexico and was also in favour of deleting the phrase "legal aspects of". For practical reasons the text should be entitled "Model Law on Electronic Commerce". A short title would be simpler to use, would make it easier to explain the issues to outsiders and would thus help win acceptance for the Model Law. The present title, on the other hand, might make people think immediately of computer law, computer security, the regulatory aspects of communication, or property rights to data.

9. **Ms. ZHANG Yuejiao** (China) said she supported the proposals by the representatives of Mexico and the United States. It was the task of the Commission to regulate the application of new technologies to electronic commerce. Changing the title would bring it more into line with the Commission's mandate to develop international trade law. A short title would make the Model Law more easily acceptable.

10. **Ms. de LA PRESLE** (France) said that she disagreed with the representative of Mexico that changing the title of the draft Model Law would not change its scope of application. The originality and interest of the text lay in the fact that it dealt with electronic communication, which concerned a number of other areas besides electronic commerce, such as civil engineering, health and the environment. If the impression was given that the text was not relevant to such areas, electronic commerce itself might be affected, since it needed to have dealings with operators in those fields. It was also necessary to make the Model Law "sellable". The title could therefore be "Model Law on Electronic Communication".

11. **Mr. ALLEN** (United Kingdom) said that he agreed with the representatives of France and Morocco. First of all, to refer to "electronic commerce" in the title was to focus on entirely the wrong aspect. The focus should be on the means of communication, not on the subject; it was not a question of the underlying transaction, but simply of the procedure. Secondly, chapter II of the draft, which concerned the application of legal requirements to data messages, was based on general provisions of the law which were not limited to the commercial field. Hence, the Commission's rules, which modified those provisions, were also not limited to the commercial field. Even chapter III of the draft Model Law, on communication of data messages, was not expressly limited to commercial transactions as such. The Working Group had included article 1, which stated that the Model Law formed a part of commercial law, as a compromise. If the title itself were changed to "electronic commerce", the Commission would actually be changing the subject matter and shifting the focus in a way that would limit its freedom in discussing the substantive provisions. In addition, the word "commerce" was unclear and not widely used in law. If the Commission wished for a short title, it might consider "Model Law on Electronic Communication" as suggested by the French representative.

12. **Ms. BAZAROVA** (Russian Federation) said that she was in favour of the idea of shortening the title, but wished to keep the phrase "legal aspects". She agreed with the representatives of France and the United Kingdom that the title should have a broader scope of application and accordingly proposed "Model Law on Legal Aspects of Electronic Data Interchange".

13. **Mr. BONELL** (Italy) said that he fully shared the views expressed about the desirability of changing the title. However, he could not but agree with the comments made by the United Kingdom, as it would not be clear what the word "commerce" referred to. The phrase "electronic communication", on the other hand, was fairly neutral and would be comprehensible to those not familiar with the subject matter. He favoured the title "Model Law on Electronic Communication".

14. **Mr. CHAY** (Singapore) said that if the Model Law was intended to cover all aspects of electronic data interchange, the reference to "legal aspects" was redundant; he agreed with the representative of the United States that it should be deleted. He had some reservations as to the term "electronic commerce", because the Model Law was intended to govern the means of communication rather than the content, and the use of "electronic commerce" might shift the emphasis to the underlying transactions. In his view, the title should be shortened to "Model Law on Electronic Data Interchange".

15. **Mr. UCHIDA** (Japan) agreed that it would be preferable to change the title, especially in order to clarify the focus of the Model Law. In his view, the title should be "Model Law on Legal Aspects of Electronic Commerce" or "Model Law on Electronic Commerce".

16. **Mr. FARIDI ARAGHI** (Islamic Republic of Iran) said that the words "legal aspects" should be retained. He was strongly in favour of taking a broader approach and considered that the best title would be "Model Law on Legal Aspects of Electronic Data Interchange".

17. **Mr. BISCHOFF** (Observer for Switzerland) expressed his agreement with the views put forward by the representatives of France and the United Kingdom. The term "electronic commerce" was new, unknown as a legal expression and might be misleading. But he agreed with the representative of the United States of America that the title could be shortened by deleting the words "legal aspects of". He suggested that a possible compromise might be "Model Law on Electronic Communication, especially Electronic Data Interchange".

18. **Ms. BOSS** (United States of America) said that there clearly existed a consensus on the need to shorten the title and to make it broad and descriptive, but that there was disagreement on how those goals were to be attained. All the suggestions put forward so far had their advantages and disadvantages. The first suggestion, that the title should be "Model Law on Electronic Data Interchange", was the narrowest and referred only to one means of electronic communication. As it did not reflect the full scope of what the Model Law was intended to cover, her country could not support that suggestion. The second suggestion, "Model Law on Electronic Communication", was short and descriptive and reflected the Model Law's aim to cover electronic communications and their use in commercial transactions. In the United States, however, communication law was defined as the regulation of communication carriers, whereas the present Model Law was not a regulatory document but a document designed to facilitate commerce. As for "Model Law on Electronic Commerce", she recognized that "electronic commerce" was a new term, but it had been adopted in the United States and in much literature pertaining to the field in question. In everyday use it did not refer to transactions such as the sale of electronic equipment, but to the means by which trade was conducted. Although the phrase might not necessarily be used in other countries with that meaning, she nevertheless considered it the best solution. Her second choice would be "Model Law on Electronic Communication".

19. **Mr. MAHASARANOND** (Thailand) agreed with the representative of the United Kingdom that the title should place the emphasis on electronic communication. The reference to international trade law could be expressed by an additional phrase. He suggested that the title should read "Model Law on Electronic Communication in International Trade Law".

20. **Mr. GRIFFITH** (Australia) considered that reference to electronic data interchange alone was too narrow, but recognized that, to some representatives, the term "electronic commerce" constituted a new expression of somewhat uncertain meaning. He suggested that the title should read "Model Law on the Legal Aspects of Electronic Commerce, including Electronic Data Interchange". An alternative means of achieving the same effect would be to insert the words "including EDI" in article 1 on the sphere of application. In his understanding, the application of the Model Law was intended to be commercial. That should be shown in the title, and the shortest way of doing so was to use the phrase "electronic commerce".

21. **Mr. SCHNEIDER** (Germany) considered that the present title was too long, too complicated and too narrow. The term "electronic data interchange" was not perfectly clear as a legal expression. The title should be short and clear and should help to make the Model Law acceptable. As the suggestion made by the representative of Italy to call it "Model Law on Electronic Communication" might be misleading in the United States, it might be possible to replace the word "communication" by the words "data messages in commerce". That said, however, he could go along with the term "electronic commerce".

22. **Mr. GILL** (India) said that, in his understanding, electronic data interchange referred to paperless trading involving the computer-to-computer transfer of transactions using agreed standards to structure the data. He agreed with Germany that a shorter name would be preferable and more attractive to potential users of the Model Law. He therefore supported the title "Model Law on Electronic Commerce".

23. **Ms. REMSU** (Observer for Canada) agreed with France, Morocco and the United Kingdom. There should be no reference to "commerce", as that would give the wrong focus. The title should reflect a broader approach. The present title appeared to be inconsistent with the principles followed in the Working Group that the title should be neutral with respect to the media and should cover information that was stored but not communicated. She suggested that a title along the lines of "Legal Aspects Related to the Use of Electronic Technologies" would be sufficiently broad and not misleading.

24. **Mr. VRELLIS** (Observer for Greece) felt that the title of the law should not necessarily have to reflect all its contents. There were many examples in national systems of laws which covered more than their titles suggested. He therefore supported the title "Model Law on Electronic Commerce", it being understood that nobody could expect all electronic commerce to be governed by such a text.

25. **Mr. CHOUKRI SBAI** (Observer for Morocco) said that the term "electronic commerce" was meaningless, unhelpful and a potential source of confusion and ambiguity. The subject matter was not so much commerce as communication: the text was concerned with data that were produced, stored and communicated by electronic, optical or similar means. Such data might be related to commerce, but could also be related to the environment, to civil works or to other matters. Conventional methods of communication, such as writing or the telephone, had recently been joined by more sophisticated means such as computers, and it was the latter field that the law was meant to cover. It was not concerned with electronic commerce in the sense of the sale of electronic equipment.

26. **Mr. AL-NASSER** (Saudi Arabia) said that the title should not be confined to electronic commerce, as that would give the impression that the law was only concerned with electronic equipment. He therefore agreed with other speakers that a reference to data that were exchanged by computer should be included. Such data could be related to records, or to the preparation of contracts by computer rather than on paper.

27. **Mr. ABASCAL ZAMORA** (Mexico) felt that it would be helpful to suspend the discussion for the time being and consider the Model Law's actual scope and the meaning of the terms used. It would then be possible to discuss the title with a clearer idea of what was wanted.

28. **Mr. AL-ZEID** (Observer for Kuwait) said that the title should be brief, to the point and as broad as possible. The word "interchange" covered all forms of information and thus gave the Model Law a broader scope than a reference to "international commerce" would have done. For example, as the representative of France had pointed out, the interchange could be concerned with the environment or civil works.

29. **The CHAIRMAN** said he had gathered the impression that the Commission considered the present title too long. Three suggestions had been put forward, namely, to call the text a "Model Law on Electronic Data Interchange", a "Model Law on Electronic Commerce", or a "Model Law on Electronic Communication". He suggested a fourth possibility, namely, a "Model Law on Electronic Means of Communication". After having asked members to indicate their preferences, he said that the majority appeared to favour the first suggestion, namely, "Model Law on Electronic Data Interchange".

30. **Mr. GRIFFITH** (Australia) said that it was not fair to ask people to vote on a choice before knowing the alternatives. It was necessary to reduce the possibilities to two before a majority view could be ascertained.

31. **Mrs. SCARNATI ALMADA de CURIA** (Argentina) asked whether the procedure just followed had been a formal vote, or merely an indication as to the general direction in which a consensus might lie. If it had been a formal vote, observers should not have been taking part.

32. **The CHAIRMAN** said that he had merely been asking for an indication of preferences.

The meeting was suspended at 11.05 a.m. and resumed at 11.35 a.m.

33. **Mr. HERRMANN** (Secretary of the Commission), referring to the procedural question raised by the Argentine representative, said that there had been no departure from the usual practice of the Commission, which followed the procedures of the General Assembly as one of its organs. Only members of the Commission were entitled to take part in formal votes; however, in 20 years there had only been a single instance of a formal vote being taken. The Commission used indicative voting, because it relied on the consensus principle, and it had always been its tradition to allow observers to participate in the indicative voting, since that enabled the views of the whole international community with its different legal traditions to be taken into account. It was a way of speeding up the procedure by not requiring each delegation to state its preference.

34. **Mr. BURMAN** (United States of America) observed that the Commission was a technical body and followed non-political traditions. It was generally accepted that the Commission should use indicative signs of support, which, although sometimes referred to as indicative votes, were understood not to be formal

(*Mr. Burman, United States of America*)

voting procedures. It was important that no distinction should be made in those informal voting procedures between observers and members so that it would be possible to get a true picture of the extent of support for a given proposal and hence of the possibility of achieving widespread utilization of the Commission's instruments.

35. **Ms. REMSU** (Observer for Canada), returning to the question of the title, asked for clarification as to the difference between "Electronic means of communication" and "Electronic communication".

36. **Mr. ALLEN** (United Kingdom) suggested that another possible title would be "Model Law on Electronic Messages and Records".

37. **The CHAIRMAN** explained that concern had been expressed that "Electronic communication" could be considered too broad, as it covered the use of broadcasting, satellites and telephones. "Electronic means of communication" might thus be a better title, since the instrument covered the sending and receipt of messages.

38. He suggested that further debate on the title should be postponed in order to allow time for informal consultations.

Article 1

39. **Mr. SORIEUL** (Secretariat) said that the present version of article 1 was the result of a compromise reached by the Working Group at its latest session. Discussion had centred on whether the text should contain a reference to commerce, to commercial information, or to commercial transactions. The solution adopted was to say that the Model Law formed part of commercial law and to refer in a footnote to the definition of the term "commercial".

40. He drew attention to the other two footnotes, the first stating that the Model Law did not overrule any rule of law intended for the protection of consumers and the second suggesting a text for States that might wish to limit the applicability of the Model Law to international data messages.

41. **Mr. BONELL** (Italy) said that the words "This Law forms part of commercial law" in article 1 created many problems. "Commercial law" had different meanings in different countries and even within them. In Italy, for instance, there were at least four or five opinions on what commercial law was, and in fact the term no longer appeared in Italian legal texts. The definition in the footnote had been taken from the Model Law on International Commercial Arbitration, but it made no sense in the context of the Model Law under discussion and did not properly describe commercial law, at least as understood in some national jurisdictions. The Commission should therefore try to find wording reflecting the main concern, which was that the Model Law should not affect laws designed to protect the consumer.

42. **Mr. CHOUKRI SBAI** (Observer for Morocco) said that his delegation found the formulation of article 1 too restrictive, even though Morocco did apply commercial law. If the instrument was to be comprehensive, covering all types of information in the form of data messages, whether commercial, environmental, agricultural or other, the text of article 1 was inadequate. The commercial law mentioned in

(*Mr. Chaukri Sbai, Observer for Morocco*)

article 1 did not apply to all persons, undertakings or activities, but only to traders or merchants. He therefore proposed the following wording: "This Law forms part of commercial law. It applies to any kind of information in the form of a data message, regardless of the parties to the relation, be they merchants or not."

43. **Mr. ABASCAL ZAMORA** (Mexico), referring to the remarks made by the representative of Italy, said that it had emerged in the course of the preliminary deliberations in the Working Group that, if the draft Model Law was to provide a set of rules encompassing all aspects of all branches of law in all countries, it would be virtually impossible to reach consensus. That would have required universal agreement on the notions of writing, signature and original, on the admissibility of data messages as evidence in judicial, arbitral and administrative proceedings, on the binding nature of all expressions of intent made through data communications, and on the obligation to keep records and information stored in data form, which would call for agreement regarding invoices, documents for presentation to customs authorities, wills, claims and petitions brought before the courts and administrative authorities, reports submitted to the authorities, including financial statements to regulatory bodies, and many other matters. The Working Group had therefore decided to adopt the working principle of confining itself to the natural ambit of UNCITRAL, namely, the regulation of trade. That was the reason for the reference to commercial law in article 1.

44. It should be pointed out that the scope of application was not restrictive. Indeed, the Working Group had previously rejected a suggestion that article 1 be amended to state that the draft Model Law did not apply to administrative and other non-commercial activities, and, at its twenty-ninth session, a proposal had been made to change the text of the draft Guide to Enactment with a view to allowing implementing States to extend the scope beyond the commercial sphere (A/CN.9/407, para. 38).

45. With regard to the question of defining the term "commercial", a similar problem had arisen at the time of drafting the UNCITRAL Model Law on International Commercial Arbitration. There had been difficulties not only for common-law countries, which did not differentiate between civil and commercial law, but also for countries that did. The concept of commercial law in Mexico, for example, did not cover the same areas as in Brazil or Spain, despite their close cultural ties. The Working Group had accordingly adopted the solution of including a footnote along the lines of the footnote in article 1 of the UNCITRAL Model Law on International Commercial Arbitration.

46. **Mr. SCHNEIDER** (Germany) said that the Working Group had been fully aware of the problems that would be created in practice by the issue just raised by the representative of Italy. Most members of the Working Group had been of the opinion that the Model Law should deal solely with data messages in commerce and not outside it; the difficulty lay in the drafting. The Italian representative's proposal for the simple exclusion of consumers was unsatisfactory, since there were possibly as many as 10 different definitions of that term within European law alone. Problems would undoubtedly have arisen whatever definition had been chosen. The current formulation of article 1 was the outcome of a compromise and should not be changed.

47. **Mr. BURMAN** (United States of America) said that his delegation wished to associate itself with the remarks of the representative of Germany. The wording of article 1 was not perfect, but was the product of substantial discussions in the Working Group. If further clarification was necessary, perhaps the amendment suggested by the Government of Singapore (A/CN.9/409) might serve to improve the language.

(*Mr. Burman, United States of America*)

48. From the comments made by some speakers at the current meeting, he felt that the Commission needed to decide how it was going to proceed in its deliberations. It had two options: it could follow the usual practice, whereby, when a draft text was submitted for consideration in plenary session after having undergone discussion at the working group level over several years, it was for the purpose of final adjustment, clarification of any unresolved points and possible textual improvements, and the text would remain essentially intact unless there was a strong body of contrary opinion; alternatively, it could reopen the entire debate, as if the years of concentrated working group effort had never taken place. Were the Commission to adopt the second approach, even three weeks would not be enough to complete its discussion of the current agenda item. He hoped that the Chairman would provide some clarification on the matter.

49. **Mr. VRELLIS** (Observer for Greece) said that the term "commercial law" appearing in article 1 was at the very least ambiguous. A matter that was part of commercial law in one country could come within civil or penal law in another. It would be preferable to reconsider the use of the term. If there had to be provision on the matter, a formulation already used in some international instruments binding common-law and civil-law countries — such as the 1968 Convention concerning Judicial Competence and the Execution of Decisions in Civil and Commercial Matters — could be adopted, in which case article 1 might read: "This Law applies to any kind of information in the form of a data message in the commercial sphere".

50. **Ms. ZHANG Yuejiao** (China) proposed that article 1 be amended to read: "This Law applies to any kind of information in the form of a data message in commercial activities". That formulation would resolve the problem of different definitions of commercial law in different countries and would also underscore the main purpose of the Model Law.

51. **Mr. GRIFFITH** (Australia) considered the Commission should refrain from substantial re-writing or re-discussion of the draft text at the present stage. In his view, the first sentence of article 1 meant nothing, and he therefore did not object to it. At previous sessions of the Working Group, some States had considered it useful for their purposes. However, if it was purely a matter of form, the sentence could perhaps be repositioned at the beginning of the footnote. That would make the text cleaner, and enacting States would be aware that they could limit the Model Law to commercial law or give it a wider sphere of operation should they so wish.

52. **Mr. BONELL** (Italy) said that he had raised the issue of the meaning of "commercial law" not only because it was a matter of great importance but also because his delegation understood that the wording in question was the result of a last-minute drafting change. As an alternative, he would be in favour of adopting a formulation along the lines suggested by Singapore and Greece, together with the proposed amendment of the footnote.

53. **Mr. ALLEN** (United Kingdom), endorsing the remarks made by the representatives of the United States of America and Germany, said that, although the text of article 1 as it stood was not ideal, it was unlikely that the Commission could arrive at another formulation that would achieve consensus. He agreed with what the representatives of Australia and Italy had just said. It would further the compromise if the footnote to the text of article 1 was remodelled in line with the footnote to the heading of the article.

54 **Mr. CHOUKRI SBAI** (Observer for Morocco) said that his delegation felt that the debates in the Commission's plenary sessions were useful and necessary. With regard to the matter under discussion, he wished to propose that the first sentence of article 1 be deleted and that the second sentence be reworded as follows: "This Law applies to any kind of information in the form of a data message". That would accommodate all the wishes expressed.

The meeting rose at 12.30 p.m.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-eighth session

SUMMARY RECORD OF THE 566th MEETING

Held at the Vienna International Centre, Vienna,
on Monday, 15 May 1995, at 2 p.m.

Chairman: Mr. GOH (Singapore)

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Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within one week of the date of distribution of this document* to the Secretary of the Commission, room E0455, Vienna International Centre.

Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

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Distr.: 22 November 1995

The meeting was called to order at 2.10 p.m.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW *(continued)* (A/CN.9/406, A/CN.9/407, A/CN.9/409 and Add.1-4)

Article 1 *(continued)*

1. **Ms. REMSU** (Observer for Canada) said that she agreed with the representatives of Germany and the United States on the undesirability of upsetting the compromise that had been achieved in the Working Group on Electronic Data Interchange on the wording of article 1. The first sentence could be accommodated within Canada's statutory framework, and she was in favour of leaving the article as proposed by the Working Group (A/CN.9/406, annex). The proposal made by the representative of Australia was interesting but might prove contentious.

2. **Mr. CHAY** (Singapore) said that the intention of his Government's proposal (A/CN.9/409), that article 1 should be amended to: "This Law applies to commercial transactions where information in the form of a data message is used" was not to reopen the discussion on the scope of application of the Model Law but simply to offer a drafting alternative aimed at achieving consistency with other UNCITRAL texts and avoiding the term "commercial law", which was virtually meaningless in Singapore. He supported the idea of explaining the term "commercial" in a footnote.

3. **Mr. BURMAN** (United States of America) said that the Singaporean proposal might be a way of improving the wording of the article while retaining the basic ingredients of the compromise. The footnote should remain, with perhaps an addition to the effect that any State might expand the scope of the Model Law to cover other forms of data communication.

4. **Mr. BONELL** (Italy) said that he supported the Singaporean proposal with the qualification put forward by the representative of the United States of America.

5. **Mr. SCHNEIDER** (Germany) said that, in his view, the first sentence of article 1 was far from meaningless but the Singaporean proposal achieved the same aim of restricting the scope of the Model Law to commercial transactions. He therefore supported it, with the refinement suggested by the representative of the United States of America.

6. **Mr. ALLEN** (United Kingdom) said that he could not support the proposed Singaporean amendment. It was much more restrictive than the existing first sentence of article 1, which represented a careful compromise reached after lengthy discussion in the Working Group. He could envisage going along with the Singaporean proposal if it were incorporated as a footnote along the lines of the present footnote allowing individual States to restrict the scope of the Model Law if they chose.

7. **Mr. ABASCAL ZAMORA** (Mexico) said that he was inclined to support the Singaporean proposal with the qualification put forward by the representative of the United States of America. However, if other representatives felt that it might upset the existing compromise, he would agree to leave the wording as it stood.

8. **Ms. de LA PRESLE** (France) said that she agreed with the representative of the United Kingdom that it was important to maintain the option provided for in the Working Group's text. If some States were unhappy with the scope of the Model Law as specified in article 1, they could opt for the alternative set forth in the footnote concerning applicability. Incorporating the content of the footnote in the text of article 1 meant encouraging States to limit the applicability of the Model Law.

9. **Mr. GRANDINO RODAS** (Brazil) said that he supported the Singaporean proposal with the amendment suggested by the representative of the United States of America.

10. **Ms. REMSU** (Observer for Canada) said that she agreed with the representatives of the United Kingdom and France that the reference to commercial transactions should be confined to a footnote.

11. **Mr. GRIFFITH** (Australia) said that he would also opt for the footnote solution.

12. **Mr. BURMAN** (United States of America) said that, in expressing support for the Singaporean proposal, he had been referring to the text of the article, not to the inclusion of the Singaporean wording in a footnote. Such a move would, in his view, amount to a substantial change. Under those circumstances, he would prefer to keep the existing version of the article.

13. **The CHAIRMAN** said that, as he saw it, there were two options: limiting the Model Law to commercial transactions, in which case the Singaporean suggestion would be a possible solution; or broadening it to include other transactions, in which case the first sentence would be deleted and some redrafting would be necessary.

14. **Mr. GRIFFITH** (Australia) said that it was important to say something substantive in the article, rather than leaving it to the footnote. He felt that the Singaporean Government's suggestion was the best. It improved the wording of the article without affecting the consensus that had emerged from the Working Group. States that wished to widen the sphere of application of the Model Law to non-commercial areas would be entirely free to do so.

15. **Mr. ABASCAL ZAMORA** (Mexico) said that, as he saw it, the intention of the Working Group had been to restrict the sphere of application to commercial transactions. The compromise reached would be overturned if the text were to be broadened to include other transactions. An interminable debate would ensue on a vast array of new issues. Perhaps the wording of the first sentence could be improved but not at the cost of undermining the existing compromise.

16. **Mr. ALLEN** (United Kingdom) said that the Working Group had deliberately avoided the words "This Law applies to commercial transactions" because the Model Law dealt in large measure with rules of evidence that had no particular relation to transactions as such. Article 5, for example, applied to any communication between parties, whether or not it led to a transaction. All of that was quite irrespective of whether States wished to apply the same rules to dealings between commercial parties and administrative authorities. Even where there had been a commercial transaction using electronic data interchange, the resulting evidence might later be needed in the context of transmissions between a commercial party and administrative authorities, for example in connection with tax or customs law. Any reference to commercial transactions therefore represented a substantial departure from the compromise reached.

17. **Mr. BURMAN** (United States of America) suggested that the term "transactions" might be replaced by some other word such as "activities". He had not realized that the Singaporean suggestion might affect the compromise reached, and the Working Group's text could certainly be retained. He joined the representatives of Australia and Mexico in warning against the possibility of opening up the entire draft Model Law to debate by introducing a substantial amendment. If any redrafting were necessary, it should be left to the drafting group, on the understanding that due account would be taken of the concerns expressed by the representative of the United Kingdom.

18. **Mr. BONELL** (Italy) said that there seemed to be considerable support for a rewording of the article. Some delegations seemed to feel that the Working Group's text could be left because it was meaningless, but he feared, on the contrary, that it meant too much. A majority also seemed to be in favour of restricting the sphere of application of the draft Model Law to the commercial field. The Singaporean proposal seemed to be acceptable except for the objection to the word "transactions" raised by the representative of the United Kingdom. Perhaps the provision could state that the Law applied "in the context of commercial activities". He urged that the matter should be referred to the drafting group.

19. **Mr. UCHIDA** (Japan) expressed support for the Singaporean proposal.

20. **Ms. REMSU** (Observer for Canada) said that she wished to express strong support for the maintenance of article 1 as it stood. She was against any incorporation of terms such as "transactions" or "commercial activities" since they were unduly restrictive.

21. **Mr. SCHNEIDER** (Germany) said that the first sentence of article 1 as drafted by the Working Group had an important meaning for his delegation, namely that the Model Law would be restricted to the commercial sphere, but other delegations interpreted it differently. He believed that the version of the article proposed by Singapore would resolve the ambiguity and should be accepted.

22. **Mr. CHOUKRI SBAI** (Observer for Morocco) said that the first sentence as it stood would restrict the Model Law to commercial transactions. His delegation wished the Model Law to be broad enough to cover matters such as rules of evidence, communications and signatures in general, transmission of data messages, acknowledgements of receipt, formation of contracts, and place of dispatch and receipt of data messages. The law should apply to all transactions. He supported the views expressed on that subject by the United Kingdom.

23. **Mr. BONELL** (Italy) said that the Commission must address two separate issues: whether to restrict the scope of the Model Law to the commercial field and, having resolved that point, whether to restrict it to transactions *stricto sensu* or extend it to other matters. Both article 1 as it stood and the wording proposed by Singapore would restrict the Law to the commercial sphere, and of the two versions he preferred the latter.

24. **The CHAIRMAN** said he believed the Commission might accept the Singaporean proposal for article 1, supplemented by a footnote allowing States wishing to do so to extend the scope of the Model Law to non-commercial matters.

25. **Mr. ALLEN** (United Kingdom) said that his country would be unable to enact a provision which spoke of commercial law, although it could entertain the notion of a commercial transaction. He suggested treating the question of the scope of the law differently according to the chapter concerned. For example chapter II, which covered rules of evidence and did not apply only to transactions, might have a footnote stating that countries wishing to do so could restrict the provisions of the chapter to commercial transactions. Chapter III might then provide that the articles it contained applied to commercial matters only.

26. **Ms. BOSS** (United States of America) believed that the solution proposed by the United Kingdom would make for confusion. The Commission should opt either for article 1 as it stood or for the Singaporean wording, bearing in mind the decision of the Working Group to limit the application of the Model Law to messages transmitted in a commercial context.

27. **Mr. ABASCAL ZAMORA** (Mexico) said that the course suggested by the United Kingdom would represent a substantial departure from the consensus reached in the Working Group, in that chapter II of the Law would be of much broader application than the Group had intended.

28. **Mr. BONELL** (Italy) said that acceptance of the Singaporean proposal for article 1 and the addition of a footnote to the article allowing States to extend the scope of the law to non-commercial matters, as suggested by the Chairman, would meet what he believed was the wish of the majority of the Commission — to have a Model Law the text of which restricted its scope to the commercial sphere.

29. **The CHAIRMAN** asked whether the Commission wished to replace the text of article 1, as approved by the Working Group, by the wording proposed by Singapore in document A/CN.9/409, together with the footnote he himself had suggested earlier.

30. *It was so agreed.*

The meeting was suspended at 3.15 p.m. and resumed at 3.45 p.m.

Article 2

31. **The CHAIRMAN** said that article 2 was likely to prove controversial. The Commission might think it advisable to consider the remaining articles of the draft first.

32. *It was so agreed.*

Article 3

33. **Mr. SORIEUL** (Secretariat) said that article 3 was based on an analogous provision in the United Nations Convention on Contracts for the International Sale of Goods and had been the subject of limited discussion in the Working Group. He drew the Commission's attention to the comments made on the draft article by Singapore and the Banking Federation of the European Union, in document A/CN.9/409, and by France and the United Nations Environment Programme (UNEP), in documents A/CN.9/409/Add.3 and A/CN.9/409/Add.4 respectively.

34. **The CHAIRMAN** invited the Commission to consider article 3 (1).

35. **Mr. BONELL** (Italy) expressed the view that article 3 (1) should be retained as it stood. The addition to the text contained in the proposal of Singapore in document A/CN.9/409 was in line with the basic philosophy of the draft Model Law, but its inclusion in an article dealing with interpretation could create difficulties and might not necessarily further the purpose of facilitating the use of electronic means — for instance, if a less sophisticated trade partner were involved.

36. **Mr. SORIEUL** (Secretariat) said he wished to mention that the last words of the Singaporean proposal corresponded roughly to one of the preambular paragraphs of a text that the Secretariat had prepared for the draft resolution to be submitted to the General Assembly together with the text of the Model Law.

37. **Mr. CHOUKRI SBAI** (Observer for Morocco) suggested that the words "international source" be amended to read "international character".

38. **Ms. BOSS** (United States of America) said that the word "source" had been chosen because, once the Model Law was incorporated in domestic law, it would not itself be international in character. Secondly, it would be appropriate for the purpose of the Model Law to be stated in the Model Law itself because the provision would thus become part of domestic law, whereas the Commission's resolution would not. Tribunals would then be directed by article 3 to facilitate rather than obstruct EDI.

39. **The CHAIRMAN** suggested that, as there seemed to be no support for changing the word "source" to "character", the Commission might wish to retain "source".

40. *It was so agreed.*

41. **Mr. ABASCAL ZAMORA** (Mexico) supported the inclusion of the text proposed by Singapore. It was important to emphasize the purpose of the Model Law in the text itself, since there was a tendency in the legal profession to regard paper-based documents as safer than EDI.

42. **The CHAIRMAN**, after inviting delegations to indicate whether they were for or against the change proposed by Singapore, noted that there was insufficient support for the change. He therefore took it that the text would be retained as in the annex to document A/CN.9/406.

43. **Mr. ABASCAL ZAMORA** (Mexico) asked whether delegations that were against the change could state their reasons.

44. **The CHAIRMAN** said that the representative of Italy had indicated some reasons.

45. **Ms. BAZAROVA** (Russian Federation) said that she did not support the proposed amendment. It was not clear why the purpose of the Model Law should be mentioned in an article on interpretation. Furthermore, the purpose of the Model Law was not so much to develop and promote EDI as to assist countries already using EDI to regulate matters arising from its use.

46. **Mr. BURMAN** (United States of America), referring to paragraph (2), proposed the insertion at the end of the paragraph of a semicolon followed by the words: "there may also be taken into account rules formulated by international organizations for use in an electronic environment, and, where appropriate, usages of trade and system rules."

(Mr. Burman, United States of America)

47. The proposed provision was not mandatory but represented recognition of the work of international bodies that focused on electronic commerce and represented a step forward. The Organization of American States had adopted a convention in the previous year at Mexico City that included similar language.

48. **Mr. BONELL** (Italy) supported the United States proposal. Apart from "hard" law there was a growing development of "soft" law consisting of rules elaborated by different international or supranational bodies. It was desirable to recognize the increasing importance of such developments at least for the purpose of supplementing "strict" legal rules, for the benefit of both. He recalled that a similar provision had been adopted by the Commission the previous week and thought that a valuable precedent was being established for the future.

49. **Mr. SCHNEIDER** (Germany) said that the proposal of the United States was interesting but that he was not sure what rules and what international bodies were referred to. There were many very different types of international bodies, intergovernmental bodies such as UNCITRAL and private international bodies and associations. The term "rules" was open to various interpretations: there were private rules such as gentlemen's agreements, rules on how to draft contracts, etc. Furthermore, private international bodies often represented only special interests and it would not be clear to the reader of the proposed text who had set up the bodies in question and whose interests they really protected.

50. **Mr. PELICHET** (Observer for The Hague Conference on Private International Law) noted that the Commission was now discussing a draft model law, not a convention. If the legislator who took over the proposed Model Law found gaps he would fill them in according to national law on the basis of general principles that might take into account the work of international organizations, but there would be no need for a paragraph in the law referring to international organizations. The amendment proposed by the United States was out of place.

51. **Mr. ABASCAL ZAMORA** (Mexico) supported the inclusion of the amendment proposed by the delegation of the United States. Mexican legislation regulating the action of banks and documentary credit in particular had a similar provision that was related directly to the Uniform Customs and Practice for Documentary Credits (UCP). The proposed amendment could assist the task of creating a culture facilitating recourse to EDI and similar communication systems.

52. **Mr. MADRID** (Spain) said that he supported the text proposed by the United States delegation, but thought it should be made clear what international organizations were referred to, in the light of the point made by the representative of Germany. Furthermore, the drafting might be crisper.

53. **Mr. BROQVIST** (Observer for Sweden) supported the remarks of the representative of Germany and shared the doubts he had expressed.

54. **Ms. BOSS** (United States of America) said she would like to clarify her delegation's proposal, particularly in the light of the concerns expressed by the representatives of Germany, Spain and Sweden. The proposal did not require tribunals to give weight to the rules of an international organization, but rather provided that they might, if they wished, take them into account. In so doing, tribunals would obviously have regard to the nature of the rule-making body, and notably as to whether it was public or private in character.

(Ms. Boss, United States of America)

Other considerations were also important: some private international bodies had achieved such status that most jurisdictions would be likely to take their rules into account.

55. The United States proposal was not limited to international bodies, but also dealt with system rules, recognizing that there might at times be an appropriate role for what might be termed private rule-makers.

56. To sum up, the proposal was not mandatory but discretionary. The kind of concerns raised by the representative of Germany would be taken into account at the time the particular rules, or rule-making body, came to be considered.

57. **Ms. de LA PRESLE** (France) said that, if the "rules" laid down by international organizations, whether public or private, were of unequal value, the usages of commercial partners and of intermediaries of value-added networks, which imposed system rules, were even more so. The majority view in the past had been that intermediaries did not fall within the sphere of application of the Model Law, and that EDI partners had always had bilateral relations without intermediaries. Was it the intention to give legitimacy through article 3 of the Model Law to rules defined by intermediaries? Paragraph (2) of article 3 as now worded could take into account a wide range of provisions. The United States proposal would introduce a great deal of additional legal uncertainty.

58. **Mr. CHOUKRI SBAI** (Observer for Morocco) said that, as the observer for the Hague Conference on Private International Law had pointed out, the Model Law would become part of the domestic law of countries that adopted it. Domestic law covered a number of subjects closely connected with the Model Law, such as contractual communications through intermediaries by telephone or by correspondence. A whole body of jurisprudence on the matter was already in existence. Paragraph (2) had been drafted in general terms, which could include not only domestic laws but also international law. He believed that the existing wording should be retained.

59. **Mr. UCHIDA** (Japan) said that in his view the objective of the United States proposal did not require adding any new wording to paragraph (2). He shared the concerns expressed by the representative of Germany, and preferred to retain the existing text.

60. **The CHAIRMAN** noted that the United States proposal was not supported. He took it that the Commission wished to retain the existing text.

Article 4

61. **Mr. SORIEUL** (Secretariat) said that article 4 contained what was regarded by some as the fundamental principle of the whole Model Law, and there had been fairly wide agreement on it in the Working Group. He drew attention to comments on the article in documents A/CN.9/409 and A/CN.9/409/Add.4.

62. **Mr. ALLEN** (United Kingdom) said that his delegation had a point to raise regarding drafting, which could perhaps be entrusted to the drafting group. In his view, information as such had no legal effectiveness, validity or enforceability: it was simply data. To say that information "shall not be denied legal effectiveness ...", was meaningless.

(Mr. Allen, United Kingdom)

63. Secondly, the article as drafted conflicted with the provisions of articles 5 and 7, which referred to existing rules of national law requiring information to be in writing or in an original document. As he saw it, article 4 would have the effect of invalidating requirements for information in writing or in a document, because it would effectively preclude any objection under national law relating to information being incorporated in a data message.

64. There was thus a need for another look at the text of the article, to ensure that it fulfilled its purpose without invalidating articles 5 and 7.

65. **Mr. MÄKELÄ** (Finland) supported Singapore's proposal (A/CN.9/409) to delete article 4. Alternatively, he could support the United Kingdom representative's approach.

66. **Mr. CHAY** (Singapore) said that his delegation had proposed deletion of article 4 principally because it felt that the existing wording merely stated the obvious. The very fact of introducing the Model Law would confer legal validity on data messages.

67. **Mr. BURMAN** (United States of America) said that article 4 had been considered by many during the long deliberations in the Working Group as a fundamental provision. While it might seem to some who worked in the field of electronic communications and their commercial application that the article merely stated the obvious, the world at large was not aware of the legal validity of data messages, as was clear from court proceedings that had taken place on the matter in a number of countries.

68. A basic text for article 4 had been agreed in the Working Group which he believed was of great importance, and could be seen as the *raison d'être* of the entire Model Law. In his view, articles 5 to 8 did not cover all possible issues that might arise, and it was essential to give a clear direction to courts and arbitrators in order to overcome their reluctance to implement EDI. Retention of article 4 was essential in order to enable the Model Law to carry the message it was intended to convey.

69. **Mr. ABASCAL ZAMORA** (Mexico) said article 4 was not a statement of the obvious, but rather a provision of a general character establishing the legal validity of messages delivered via a certain means of communication. He agreed that it embodied a fundamental principle of the Model Law, and should be retained.

70. **Ms. de LA PRESLE** (France) endorsed the views of the two previous speakers. Article 4 had, at the very least, an educational value, and as such should be retained. She agreed that the language of the article could be improved.

71. **Ms. BAZAROVA** (Russian Federation) favoured retention of article 4, and agreed with the explanations given by other speakers in that regard.

72. **Mr. CHOUKRI SBAI** (Observer for Morocco) agreed that article 4 was useful in that it embodied a general rule. However, he did not think the wording was appropriate. He would prefer a formulation along the lines: "The exchange of information in the form of a data message shall have legal validity ...".

73. **Mr. GRIFFITH** (Australia) said his delegation had no difficulty with article 4, since the word "solely" made quite clear how the scope of application of the article related to that of subsequent articles. He therefore favoured retention of the existing text.

74. **Mr. RAUSCHER** (Austria) endorsed the views of the representatives of Finland and Singapore. Austria felt that it was not necessary to have a general statement on the validity of data messages in addition to the specific provisions in articles 5 to 8. However, it appeared that some legal systems would require such a general statement. He suggested as a compromise solution that article 4 be retained, and that a strongly worded statement be included in the Guide to Enactment to the effect that article 4 enunciated only the basic principle of non-discrimination, and was not intended to overrule the more specific requirements of articles 5 to 9.

75. **Ms. REMSU** (Observer for Canada) agreed that article 4 should be retained, and that the word "solely" was sufficient to establish the general character of the article as compared to the specific requirements of subsequent ones. She supported the suggestion for a commentary to make the point clear.

76. **Ms. EKEMEZIE** (Nigeria) also supported retention of article 4.

77. **Ms. ZHANG Yuejiao** (China) said that, since electronic data messages were a new form of business transaction, they had not yet been given recognition in many legal systems. It was thus important to retain a provision granting such legal recognition.

78. **Mr. BROQVIST** (Observer for Sweden) supported the Austrian proposal.

79. **Mr. ANDERSEN** (Observer for Denmark) also endorsed that proposal. The argument by the United Kingdom representative that information did not in itself have legal effectiveness did not take into account the fact that article 4 was concerned with a specific type of information, namely information in the form of a data message. At any rate, a provision containing such an important principle should not be deleted.

80. **Mr. BURMAN** (United States of America) said that the language of article 4 had given rise to some difficulty, and had been laboured over extensively; the wording that had emerged had been the best that could be found. He endorsed the Austrian proposal for clarification in a commentary.

81. **Mr. VRELLIS** (Observer for Greece) said it was clear that article 4 was very important and should be retained. However, the drafting could be improved, and he supported the United Kingdom proposal in that regard.

82. **The CHAIRMAN** noted that there was overwhelming support for retention of article 4. There seemed also to be support for the Austrian suggestion that a commentary on that article be included in the Guide. He took it that there were no objections to the United Kingdom proposal.

83. **Mr. GRIFFITH** (Australia) said that the United Kingdom proposal seemed unnecessary.

84. **Mr. BURMAN** (United States of America) said that the United Kingdom proposal had certainly not received overwhelming support.

85. **Mr. ALLEN** (United Kingdom) said he had not proposed any specific amendment to article 4, but had proposed that the text should be reviewed by the drafting group. The fact that an earlier drafting group had already worked on the text did not mean that another group would not succeed in finding a better solution.

86. **Ms. de LA PRESLE** (France) supported the United Kingdom proposal. If the article was to have an educational value for jurists not familiar with modern means of communication, it was important to ensure that it was properly worded.

87. **Mr. GRIFFITH** (Australia) said that it was clearly the majority view that the text produced by the Working Group on Electronic Data Interchange was fully satisfactory. The idea that article 4 needed improvement had received only minimal support. As a matter of principle, the Commission should support texts approved by the Working Group, unless a clear majority favoured a specific alternative. He urged the Commission to endorse the existing text of article 4.

88. **The CHAIRMAN** said the debate had shown that article 4 as it stood was acceptable. Since the text would in any case be referred to the drafting group for finalization, further drafting refinements would not be ruled out, but he took it the Commission's position was that the basic concept of the article was satisfactory and that the debate on it should not be reopened.

ELECTION OF OFFICERS *(continued)*

89. **Mr. GRIFFITH** (Australia) nominated Mr. Bossa (Uganda) for the office of Rapporteur.

90. *Mr. Bossa (Uganda) was elected Rapporteur by acclamation.*

The meeting rose at 5 p.m.